FILE COPY

FILED
JUL 22 1936
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 218

PEOPLE OF THE STATE OF NEW YORK ON RELATION OF C. HANDASYDE WHITNEY,

Appellant,

against

MARK GRAVES, JOHN P. HENNESSEY AND JOHN J. MERRILL, AS TAX COMMISSIONERS OF THE STATE OF NEW YORK,

Appellees.

APPEAL FROM THE SUPREME COURT, COUNTY OF ALBANY, STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

JOHN J. BENNETT, JR.,
Attorney-General of the State of New York,
Attorney for Appellees.
JOSEPH M. MESNIG,
Assistant Attorney-General
of the State of New York,
Counsel for Appellees,
The Capitol, Albany, New York.

INDEX.

Subject Index.

	Page
Statement opposing jurisdiction and motion to dismiss or affirm	1
Statement of the case	2
State statutes involved	4
Argument	5
The question upon which the decision of this cause depends is so unsubstantial as not to need further argument	5
Opinions below	

Table of Cases Cited.

Belton v. Hatch, 109 N. Y. 593	6
Bristol v. Washington County, 177 U. S. 133	5
Citizens National Bank v. Durr, 257 U. S. 99	5
Liverpool & L. & L. Ins. Co. v. Orleans Assessors, 221 U. S. 346	5
Ludlum v. Wagner, 212 App. Div. 779	6
New Orleans v. Stempel, 175 U. S. 309	5
People ex rel. Blagden v. Lynch, 292 U. S. 602	4
People ex rel. Sackett v. Lynch, 291 U. S. 652	4
People ex rel. Whitney v. Graves et al., 246 App. Div. 652, 271 N. Y. 90, 271 N. Y. 114	8
Rogers v. Hennepin County, 240 U. S. 184	5
Wheeling Steel Corp. v. Fox, No. 663. October Term, 1935, — U. S. — (decided May 18, 1936)	5

Statutes Cited.

New York Civil Practice Act, Article 78	2
New York Tax Law, Section 351	6
Section 351a	4
Section 375	4
Regulations of the New York State Tax Commission, Manual 34, Article 228	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 218

PEOPLE OF THE STATE OF NEW YORK ON RELATION OF C. HANDASYDE WHITNEY,

Appellant,

against

MARK GRAVES, JOHN P. HENNESSEY AND JOHN J. MERRILL, AS TAX COMMISSIONERS OF THE STATE OF NEW YORK,

Appellees.

APPEAL FROM THE SUPREME COURT, COUNTY OF ALBANY, STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

MAY IT PLEASE THE COURT:

Now come the appellees in the above entitled cause, by their counsel of record, and move that the appeal herein be dismissed, or that the judgments appealed from be affirmed.

Statement of the Case.

This is a certiorari proceeding authorized by § 375 of the New York Tax Law and Article 78 of the New York Civil Practice Act. In the proceeding appellant seeks a review of a final determination of the State Tax Commission which, after a hearing and appropriate procedure, affirmed an assessment of additional income tax against appellant for the calendar year 1929.

Appellant was at all times a resident of the Commonwealth of Massachusetts and became, in 1909, the owner of a "seat" or membership in the New York Stock Exchange. He was a partner in a Boston brokerage firm known as Whitney & Elwell, which firm, in 1929, consisted of four partners, including appellant, all residents of Massachusetts. The "seat" was a firm asset, ownership being divided equally among the four partners (R. 136-141*).

In 1929, the membership of the Stock Exchange was increased from 1100 to 1375 and a "right", equal to one-fourth of a membership, was distributed to each of the 1100 original members. Appellant, in 1929, sold his "right" for $108,000.00, and upon the profit accruing to appellant therefrom, an income tax of $280.00 was assessed (R. 26).

Appellant effected the sale of his "right" through the Secretary of the New York Stock Exchange in New York and transfer was made by giving power of attorney to a New York firm (R. 222-224).

Whitney & Elwell transacted a general brokerage business in Boston, holding itself forth as a member of the New

---

* Folio references are to Record in New York Court of Appeals.

York Stock Exchange. Its bill-heads bore prominent notation of such membership (Exhibits B and C, Op., p. 72 R.). It executed its customers' orders for stocks listed on the New York Stock Exchange through other members who were engaged in brokerage business at New York City (R. 145-147). Under the rules of the Exchange it divided the commissions with the broker who executed the order on the floor of the Exchange (R. 153-156, 168-169).

Appellant's firm, in 1929, had an arrangement with three member-firms (R. 146) to execute its orders on the Exchange. Under such arrangement, the New York firm was constituted *the agent of appellant's firm* for the purpose of consummating purchases and sales on the New York Stock Exchange (R. 188, 205-216). The New York agent charged Whitney & Elwell forty per cent of the regular commission, while Whitney & Elwell charged its customer full commission, thus receiving net sixty per cent of the commission on purchases and sales executed in New York by its agent (R. 184-189).

In 1929, Whitney & Elwell dealt in approximately 3,000,000 shares listed on the Exchange, having an estimated value of $150,000,000.00 (R. 197-198). It also participated in certain syndicate participations with New York financial houses (R. 166, 193, 199).

The New York Stock Exchange is an unincorporated voluntary association, limited as to membership, governed by its own constitution, by-laws and rules, and holds the beneficial ownership of the entire capital stock of a New York corporation which owns the building in which the business of the Exchange is transacted, with the land upon which it stands, and which is situated in the City of New York (R. 134). A member may personally buy or sell only in the Exchange building, except that a member may buy or sell for the account of other members at a commission substantially less than that charged to a non-member.

Such rights and privileges are valuable and are exercisable only in transactions conducted at the New York Stock Exchange building in the City of New York (R. 135).

State Statutes Involved.

This cause involves the application of §§351 and 351-a of the New York Tax Law, quoted in part in appellant's statement as to Jurisdiction on appeal herein. Pursuant thereto, the New York personal income tax is imposed upon non-residents with respect to the income derived "from all property owned and from every business, trade, profession or occupation carried on in this State" by such non-residents.

These identical statutes were involved in two cases in which this Court dismissed appeals from decisions of the State courts which had upheld the action of the State Tax Commission in making assessments upon not dissimilar facts.

People ex rel. Blagden v. *Lynch*, 292 U. S. 602;
People ex rel. Sackett v. *Lynch*, 291 U. S. 652.

While these cases are distinguishable upon the ground that the appellants there had been engaged in the brokerage business in New York, the fact nevertheless remains that a tax was asserted upon both statutory bases; namely, that the profit there arising from the sale of memberships in the New York Stock Exchange constituted income from a New York business and constituted income from property owned in New York. Furthermore, in the *Blagden* case, it was a conceded fact that the appellant there had retired from business in New York on or before December 31, 1927, and had made no use of his membership for business purposes after that date. The sale of the membership took place in 1928. As in the instant case, no opinions were filed by the State courts.

ARGUMENT.

The Question Upon Which the Decision of This Cause Depends is so Unsubstantial as Not to Need Further Argument.

Appellees urged in the Court below that Appellant's membership and "right" constituted intangible personal property and, because of the facts and circumstances surrounding its use and of the rights and privileges which it conferred upon its owner, had a business situs in New York, thus subjecting it to taxation here.

New Orleans v. *Stempel,* 175 U. S. 309;
Bristol v. *Washington County,* 177 U. S. 133;
Liverpool & L. & L. Ins. Co. v. *Orleans Assessors,* 221 U. S. 346;
Citizens National Bank v. *Durr,* 257 U. S. 99;
Rogers v. *Hennepin County,* 240 U. S. 184;
Wheeling Steel Corp. v. *Fox,* No. 663, October Term, 1935, — U. S. — (decided May 18, 1936).

Solely because of his membership, appellant has been able to conduct large and profitable transactions in securities in his Boston brokerage business. At all times possessed of the right to go upon the floor of the Exchange and personally conduct his firm's trading, he chose to carry on his operations through the medium of an agent located in this State.

Appellants' argument carries with it a tacit admission that, if appellant made personal use of his membership in New York, a business situs would result. If that be so, assuredly the identical result obtained through the medium of a New York agent must also attach a business situs in New York to the property.

In addition, under the decisions of the courts of this State, it would seem that, for most purposes, including

taxation, the New York Stock Exchange constitutes a partnership.

Ludlum v. *Wagner*, 212 App. Div. 779;
Belton v. *Hatch*, 109 N. Y. 593.

The matter is dealt with in the Personal Income Tax Regulations (Manual 34) promulgated by the State Tax Commission. Thus, Article 228 reads:

> "Association distinguished from partnership. An organization, the partnership interests in which are not transferable without the consent of the members, is a partnership and not an association. Any so-called association or organization not taxable under article 9-a of the tax law and not exempted under such article, will be regarded as a partnership within the meaning of the income tax law. The members of such partnerships will be required to include in their returns their share of the profits of such partnerships, whether distributed or undistributed. Such partnerships will be required to file returns in the same manner as all other partnerships."

It would seem to follow that, for at least the purposes of the New York personal income tax, the New York Stock Exchange constitutes a New York partnership. This brings us to the inevitable conclusion that appellant's membership, being a partnership interest in a New York business, constitutes property with a business situs in New York.

In any event the question here would appear to be conclusively controlled by the decision of this Court in *Rogers* v. *Hennepin County, supra.* That case involved the taxation of memberships in the Minneapolis Chamber of Commerce, as affecting members who were (1) residents of Minneapolis, (2) residents of Minnesota, outside of Minneapolis, and (3) residents of other States. With respect to all members residing outside of Minneapolis, it is stated

(p. 186) that such members did not operate upon the exchange personally, except at rare intervals, and that their use of their memberships was practically limited to dealing through other members at reduced rates, exactly as in the instant case.

This Court held that the memberships of such non-residents, nevertheless, were taxable at the place where the exchange was located. Mr. Justice Hughes wrote, page 191:

> "There is the further contention with respect to the authority of the State to tax the memberships owned by citizens of other states. It is urged that the memberships are intangible rights held by the member at his domicile. *But it sufficiently appears from the allegations that the memberships represented rights and privileges which were exercised in transactions at the Exchange in the City of Minneapolis, and we are of the opinion, applying a principle which has had recognition with respect to credits in favor of non-residents arising from business within the State,* and in the case of shares of stock of domestic corporations, that it was competent for the State to fix the situs of the memberships for the purpose of taxation, whether they were held by residents or non-residents, at the place within the State where the exchange was located." (Emphasis ours.)

And, in *Citizens National Bank* v. *Durr, supra,* this Court held that Ohio might impose a property tax upon a membership in the New York Stock Exchange owned by a resident of Ohio, at the same time strongly intimating that New York might also tax the membership because of the rights and privileges localized there. In a vigorous dissent, Mr. Justice Holmes thought that the privilege of membership was so localized in New York as to vest exclusive jurisdiction to tax in that State.

We submit that this cause presents no question sufficiently substantial to warrant review by this Court.

Opinions Below.

No opinion was written by either court below. The unanimous decision of the Appellate Division of the Supreme Court, Third Judicial Department, is reported in 246 App. Div. 652. The unanimous decision of the Court of Appeals is reported in 271 N. Y. mem. 90, and 271 N. Y. mem. 114.

Dated June 25, 1936.

JOHN J. BENNETT, JR.,
Attorney-General of the State of New York,
Attorney for Appellees.
JOSEPH M. MESNIG,
Assistant Attorney-General of the State of New York,
Counsel for Appellees,
The Capitol, Albany, New York.